1928

*May 4. 7.
*Oct. 2.

HANNAH BRODY, MADE PARTY DEFENDANT BY ORDER GRANTED HEREIN THE 27TH DECEMBER, 1927, TO CARRY ON THE PROCEEDINGS (DEFENDANT)..... } APPELLANT;

AND

THE DOMINION LIFE ASSURANCE COMPANY (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Life insurance—Action by insurer for cancellation of policies on ground of insured's fraudulent misrepresentations as to health—Jury's findings held perverse by appellate court—Jurisdiction of Supreme Court of Nova Scotia en banc to substitute its findings for those of jury and give judgment thereon—Rules of Court (N.S.); O. 38, R. 10; O. 57, R. 5.

B. (the original defendant, since deceased) made three applications to plaintiff for life insurance, on each of which a policy was issued. Plaintiff sued for a declaration that the policies were null and void, on the ground that B. knew, when he made the application in each case, that he was not in good health, but fraudulently represented that he was, for the purpose of inducing issuance of the policies. At the trial, the jury found that B., at the time of the applications, was in ill health, but was unaware of that fact when he signed the first two applications, but knew it when he signed the last one. On these findings Jenks J. (60 N.S. Rep. 116) dismissed the action as to the first two policies, but directed cancellation of the last one. On appeal, the Supreme Court of Nova Scotia *en banc* (60 N.S. Rep. 116) held that the jury's findings that B. did not know he was in ill health when he signed the first two policies were perverse, and it directed that the first two policies be also cancelled, upon payment back of all premiums paid. The defendant appealed.

Held, that, upon the evidence, the jury's findings that B. did not know he was in ill health when he signed the first two applications were perverse; that the Court *en banc* had jurisdiction to substitute its own findings of fact for those of the jury and give judgment for the plaintiff; and that its judgment should be affirmed.

On said question of jurisdiction, the Court discussed Order 38, Rule 10, and Order 57, Rule 5, of the Rules of the Supreme Court of Nova Scotia, and Order 40, Rule 10, and Order 58, Rule 4, of the English Rules, and referred to *Miller* v. *Toulmin,* 17 Q.B.D. 603, and *R.M. of Victory* v. *Sask. Guar. & Fidelity Co. Ltd.* [1928] S.C.R. 264.

APPEAL by the defendant from the judgment of the Supreme Court of Nova Scotia, *en banc* (1), allowing the plaintiff's appeal, and dismissing the defendant's cross-

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) (1928) 60 N.S. Rep. 116.

appeal, from the judgment of Jenks J. (1), given on the findings of the jury at the trial, dismissing the plaintiff's action as to the first two policies of life insurance in question, but directing cancellation of the third one. The plaintiff's action was for a declaration that three contracts of life insurance were null and void, on grounds hereinafter mentioned.

The formal judgment of the Court *en banc* ordered " that the motion for a new trial asserted by the plaintiff herein be and the same is hereby allowed "; that " the cross-motion asserted by the defendant herein be and the same is hereby dismissed "; and that " upon the plaintiff paying or tendering to the defendant the amount of all premiums paid to the plaintiff in respect of [the three policies in question in the action], less any balance of costs that may be taxed in favour of the plaintiff * * * the said [three policies in question] be and the same are hereby cancelled and rescinded and shall forthwith be delivered to the plaintiff for cancellation."

The following statement of the case and of the proceedings below is taken from the judgment of Lamont J., who delivered the reasons for the judgment of this Court.

" The question to be decided in this appeal is: Was there evidence before the jury on which it could reasonably find that Hyman Brody believed he was in good health when he made certain applications for insurance on his own life with the respondent company?

" The applications were made on the following dates, namely, December 9th, 1925; February 15th, 1926, and March 10th, 1926. In each application Brody made the following representation:—

> I hereby declare that to the best of my knowledge, information and belief my health is good.

" Pursuant to each of these applications a policy was issued to Brody. After issuing the last of these policies, the company received information which led it to believe that Brody had not been in good health when he applied for insurance, and, on December 17th, 1926, it brought this action and asked for a declaration that the three contracts of insurance entered into with Brody were null and void

(1) (1927) 60 N.S. Rep. 116.

1928

BRODY v. DOM. LIFE ASSUR. CO.

on the ground that when he made application in each case he knew that he was not in good health, but fraudulently represented that he was, for the purpose of inducing the company to issue to him the policies which in fact it did issue. The matter came on for hearing before Mr. Justice Jenks, sitting with a jury. The jury found that at the time Brody made the applications above referred to he was in fact in ill health, but that he was unaware of that fact when he signed the applications of December 9th, 1925, and February 15th, 1926. As to the application of March 10th, 1926, the jury found that on that date Brody was in ill health to his knowledge.

"On the answers of the jury the trial judge dismissed the plaintiff's action in so far as the first two contracts of insurance were concerned, but directed that the last contract be 'cancelled and rescinded'. The plaintiff company appealed from that judgment to the Supreme Court of Nova Scotia, *en banc,* and the defendant cross-appealed in respect of the last policy.

"Hyman Brody having died, Hannah Brody, his wife and the beneficiary named in the three policies, was substituted as defendant.

"The court *en banc* held that the answers of the jury to the effect that Brody did not know that he was ill when he signed the applications of December 9th, 1925, and February 15th, 1926, were perverse. It also found as a fact that as early as October, 1925, Brody knew that he was in ill health. It therefore directed that the policies founded on the first two applications be also cancelled upon the plaintiff's paying back or tendering the premiums paid. The cross-appeal was dismissed. From the judgment *en banc* the defendant now appeals to this Court."

C. J. Burchell K.C. for the appellant.

R. S. Robertson K.C. and *G. McL. Daley* for the respondent.

After hearing argument by counsel for the parties, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal with costs. Written reasons were delivered by Lamont J., with whom the other members of the Court concurred.

The written judgment, after stating the case and the proceedings below, as above set out, discusses the evidence at

length, and holds that the answers of the jury that Brody believed himself to be in good health at the times of his applications for policies on December 9, 1925, and February 15, 1926, must be held perverse.

The judgment then proceeds as follows:

"The only other point to be considered is: Had the court *en banc* jurisdiction to substitute their own findings of fact for those of the jury and give judgment for the plaintiff?

"In the Rules of the Supreme Court of Nova Scotia there are two rules dealing with the power of the court to draw inferences of fact where the action has been tried with a jury. The first, Order 38, Rule 10, provides that upon a motion for judgment or upon an application for a new trial the court may draw all inferences of fact not inconsistent with the finding of the jury. The other, Order 57, Rule 5, under the heading of "Appeals", contains this provision:

> The court shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case requires.

"Both these rules have their counterpart in the English Rules in Order 40, Rule 10 and Order 58, Rule 4, but the latter rule refers expressly to the Court of Appeal.

"The scope of the English Rule is dealt with in *Millar* v. *Toulmin* (1),

"In Nova Scotia there is but one court, and it has both original and appellate jurisdiction and has, with certain exceptions not material here, the same powers as were, on the first day of October, 1884, exercisable in England by the Court of Appeal and the High Court of Justice. Order 58, Rule 4, was in force on that date. In my opinion, therefore, Order 38, Rule 10, cannot have the effect of limiting the power of the court in appeal given by Order 57, Rule 5.

"In the recent case of *Rural Municipality of Victory* v. *Saskatchewan Guarantee and Fidelity Company Ltd.* (2), this Court, following the decision of the House of Lords in *Calmenson* v. *Merchants' Warehousing Co. Ltd.* (3), held that the Court of Appeal of Saskatchewan, under a similar rule, had jurisdiction to substitute its own findings of fact

(1) (1886) 17 Q.B.D. 603.
(2) [1928] S.C.R. 264.
(3) (1921) 125 L.T. 129, at p. 131.

1928

BRODY v. DOM. LIFE ASSUR. CO.

for those of the jury where the findings of the jury were perverse and the members of the court were of opinion (1) That they had all the facts before them, and (2) That if a new trial were granted no further evidence could be given, which would alter the result.

"In the present case Brody is dead. Further evidence from him cannot, therefore, be had. It was contended on his behalf that the testimony of the doctors who examined him when he applied for the policies of insurance should be placed before the jury. I am unable to see how any evidence that these doctors might give could throw any light upon the question of Brody's knowledge of the state of his health at the time he signed the applications. They could only testify as to what they found, which could not assist in determining the question before the jury. Such evidence, in my opinion, would not alter the result.

"I would therefore dismiss the appeal with costs."

Appeal dismissed with costs.

Solicitor for the appellant: *G. A. R. Rowlings.*

Solicitor for the respondent: *E. C. Phinney.*